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From:

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To:

Cc:

Subject: advice on FIRPTA

Thanks for your patience while I coordinated with the IRC § 1445 experts within Counsel (). Here is a written explanation that you can provide to the Service Center in bringing resolution to your case.

Facts

A nonresident alien sold real property located in the United States, which is a United States real property interest (USRPI) as defined in IRC § 897(c)(1)(A)(i) and Treas. Reg. § 1.897-1(c)(1)(i). The buyer withheld 10% of the amount realized on the sale, as required under IRC § 1445(a) and Treas. Reg. § 1.1445-1(b)(1). However, the buyer did not pay over the amount withheld to the IRS. Consequently, the nonresident alien seller did not receive a stamped copy of Form 8288-A from the IRS.

The seller filed a U.S. tax return on which it sought a credit in the amount withheld against his tax liability, and sought a refund of the excess amount withheld. To date, the Service Center has refused to grant the credit because it has no record of receiving the amount withheld from the buyer, as in fact the buyer had not paid over the amount withheld.

Issue

Whether the seller is entitled to the credit (and thus a refund) even though the amount withheld was never paid to the IRS.

Conclusion

Yes, the seller is entitled to the credit (and thus a refund in this case), provided that the seller has substantial evidence (e.g., closing documents) of the amount of the credit.

Analysis

Treas. Reg. § 1.1445-1(f)(1) (last sentence) provides that "[a]ny tax withheld under section 1445(a) shall be credited against the amount of income tax as computed in [the seller's] return." See also IRC § 1462 (granting a credit for income tax withheld at the source). Treas. Reg. § 1.1445-1(f)(2) provides that generally a stamped copy of Form 8288-A (Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests) must be attached to the seller's return to establish the amount withheld which is available as a credit. If the amount withheld under IRC § 1445(a) exceeds the seller's maximum tax liability with respect to the disposition (as determined by the IRS), then the seller may seek an early refund of the excess pursuant to Treas. Reg. § 1.1445-3(g), or a normal refund upon the filing of a tax return.

Treas. Reg. § 1.1445-1(f)(3)(i) provides that if a stamped copy of Form 8288-A has not been provided to the seller by the IRS, the seller may establish the amount of tax withheld by the buyer by attaching to its tax return substantial evidence (e.g., closing documents) of such amount. Such a seller must attach to its return a statement which supplies all of the information required by Treas. Reg. § 1.1445-1(d), including the seller's identifying number. The preamble to T.D. 8113 (Dec. 24, 1986), which finalized the IRC § 1445 withholding regulations, explains that Treas. Reg. § 1.1445-1(f)(3)(i) was promulgated specifically to deal with the situation in which the buyer failed to remit the withheld funds to the IRS. Accordingly, if the seller filed the requisite tax return and establishes the amount withheld through substantial evidence, the Service Center should grant a credit to the seller to the extent the amount withheld exceeds his maximum tax liability with respect to the disposition, as determined by the IRS.

It should be noted that IRC § 1461 and Treas. Reg. § 1.1445-1(e) impose liability on the buyer for the tax which it was required to withhold. In addition, IRC § 6651 imposes penalties on the buyer for failure to file Form 8288 when due, and for failure to pay the withholding when due.

has spoken with the attorney who previously provided you advice in this case, and all parties are now in agreement that credit for the withholding is permissible even though the amount withheld was never paid to the IRS. Thus, please disregard the advice previously provided by

Please let me know if you have any questions.